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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND JAPPAUL WADE,

Defendant and Appellant.

B240588

(Los Angeles County Super. Ct.
No. BA389493)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barbara Johnson, Judge. Affirmed and remanded with directions.

A. William Bartz, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen, Supervising Deputy Attorney General, and Jonthan M. Krauss, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Raymond Japaul Wade was convicted by jury of possession of cocaine in violation of Health & Safety Code section 11350, subdivision (a), a lesser but necessarily included offense of possession of cocaine base for the purpose of sale. The trial court sentenced defendant to state prison for the low term of 16 months, to be served in the county jail, after finding defendant unsuitable for Proposition 36 probation.

In his timely appeal from the judgment, defendant contends he was statutorily eligible for Proposition 36 probation, which is mandatory in the absence of a disqualifying factor. The Attorney General concedes that defendant is correct, but the trial court misunderstood its discretion to determine that defendant was ineligible because the current offense involved possession of cocaine for sale, notwithstanding the jury's verdict.

We agree with the parties that defendant's criminal history did not render him unsuitable for Proposition 36 probation. However, the record supports the Attorney General's position that the trial court may have misunderstood its discretion to make a factual finding by a preponderance of the evidence that defendant was ineligible for Proposition 36 probation because he possessed cocaine for the purpose of sale, notwithstanding the jury's verdict that the offense was possession of cocaine. Accordingly, we affirm the judgment but remand to allow the trial court to determine whether the current offense disqualified defendant from Proposition 36 probation on the ground that his offense involved the possession of cocaine for the purpose of sale.

FACTS

On October 1, 2011, defendant was observed talking to several people in front of San Julian Park. At the direction of Los Angeles Police Department Officer Dion Joseph, defendant was taken into custody by two other officers. Defendant was transported to the police station, where a body cavity search of his rectum lead to the discovery of rocks of cocaine base weighing 6.17 grams. Officer Joseph opined that defendant possessed the

cocaine for the purpose of sale, based upon its street value, the number of doses contained, and the absence of drug paraphernalia on defendant's person.

DISCUSSION

A trial court must grant Proposition 36 probation to an eligible defendant who commits a nonviolent drug possession offense. Defendant argues he was statutorily eligible for Proposition 36 probation, and the court erred in finding him unsuitable and committing him to state prison. We agree the trial court lacked the power to deny defendant Proposition 36 probation on the ground he was unsuitable. However, there is an unresolved issue that requires a remand to the trial court to determine whether defendant committed a nonviolent drug possession offense, and if so, Proposition 36 probation must be granted.

“Following the enactment of Proposition 36, the ‘Substance Abuse and Crime Prevention Act of 2000,’ which took effect July 1, 2001, a defendant who has been convicted of a ‘nonviolent drug possession offense’ must receive probation and diversion into a drug treatment program, and may not be sentenced to incarceration as an additional term of probation. (Pen. Code, § 1210.1, subd. (a).)” (*People v. Canty* (2004) 32 Cal.4th 1266, 1272-1273, fn. omitted.) “Proposition 36 outlines an alternative sentencing scheme for those convicted of certain narcotics offenses. In effect, it acts as an exception to the punishment specified in an individual narcotics offense.” (*In re Varnell* (2003) 30 Cal.4th 1132, 1136.)

“The term ‘nonviolent drug possession offense’ means the unlawful personal use, possession for personal use, or transportation for personal use of any controlled substance identified in Section 11054, 11055, 11056, 11057 or 11058 of the Health and Safety Code, or the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code. The term ‘nonviolent drug possession offense’ does not include the possession for sale, production, or manufacturing of any

controlled substance and does not include violations of [Penal Code s]ection 4573.6 or 4573.8.” (Pen. Code, § 1210, subd. (a).)

There are five classes of defendants who statutorily unsuitable for Proposition 36 probation eligibility following conviction of a nonviolent drug possession offense. (Pen. Code, § 1210.1, subd. (b).) Defendant contends, and the Attorney General correctly agrees, that defendant does not fall into any of the five categories that would render him automatically ineligible for Proposition 36 probation.

Despite defendant’s statutory eligibility, the Attorney General argues that the matter should be remanded to allow the trial court to determine if defendant committed a nonviolent drug possession offense. The Attorney General reasons that defendant was charged with possession of cocaine base for the purpose of sale, the record contains substantial evidence of possession for the purpose of sale, and although the jury acquitted him of that offense and found him guilty of the lesser offense of possession of cocaine, the court retained the power to determine, by a preponderance of the evidence, that defendant’s conduct did not involve possession of cocaine for personal use. We agree.

“We recognize that the acquittal of a charge or not true finding of a sentencing allegation generally does not bind the trial court from redetermining the personal use issue for Proposition 36 purposes based on the preponderance of the evidence standard because an acquittal or not true finding merely means that the jury was not convinced beyond a reasonable doubt on such issue. ([*U.S. v.*] *Watts* [(1997)] 519 U.S. [148,] 157; [*People v.*] *Dove* [(2004)] 124 Cal.App.4th [1,] 11 (*Dove*).) Further such determination may be implied from the fact a prison sentence is imposed. (*Dove*[, *supra*,] at pp. 10-11; [*People v.*] *Barasa* [(2002)] 103 Cal.App.4th [287,] 291–295.)” (*People v. Harris* (2009) 171 Cal.App.4th 1488, 1498 (*Harris*).)

Thus, the law permits the trial court to find by a preponderance of the evidence that a controlled substance was not possessed for personal use, even where the jury returns a verdict to that effect. In order to address the Attorney General’s contention, we look to proceedings at sentencing to determine if the trial court understood and exercised

its authority to make the necessary finding that defendant committed a nonviolent drug possession offense as defined in Proposition 36.

As noted, defendant was acquitted of possession of cocaine base for the purpose of sale but convicted of possession of cocaine. At the probation and sentence hearing, the trial court found defendant in violation of probation in two prior cases—convictions of child endangering (Pen. Code, § 273a) and possession of cocaine. Defense counsel told the court defendant was eligible for Proposition 36 probation. The prosecutor noted defendant’s “dismal performance on probation” and observed that “although he was only convicted of the lesser included, he was possessing for sales.”¹ The prosecutor requested a prison sentence to be served in county jail.

After further discussion regarding defendant’s probation cases, the trial court stated, “I don’t think he’s—he may be eligible for Proposition 36, but I don’t think he’s suitable.” The court added, “I think that we can have our opinions as to whether or not the person was—whether or not Mr. Wade possessed the drugs for sale, but the matter of fact was that the jury found that he didn’t possess it for sale, and we have to abide by their ruling.”

After additional discussion of defendant’s record, the trial court repeated, “But I think that the defendant is not suitable for Proposition 36.” Defense counsel told the court defendant would benefit from Proposition 36 probation, but the court was unmoved. Defendant was sentenced to state prison for the low term of 16 months, to be served in the county jail.

The trial court’s statement regarding whether defendant possessed the cocaine for sale—“we can have our opinions as to . . . whether or not Mr. Wade possessed the drugs for sale”—is ambiguous and is certainly susceptible to the interpretation that the court believed defendant did not possess the cocaine for personal use. The court’s conclusion “that the jury found that he didn’t possess it for sale, and we have to abide by their

¹ Based on the prosecutor’s express comment that defendant possessed the cocaine for sale, despite the jury verdict, we reject defendant’s argument that the prosecution waived the issue of remanding the cause to the trial court.

ruling,” is inconsistent with case law recognizing the court’s power to independently determine the purpose of possession of a controlled substance, even where the jury rejects a possession for sale charge in favor of a conviction of simple possession. (*Harris, supra*, 171 Cal.App.4th at pp. 1497-1498; *Dove, supra*, 124 Cal.App.4th at p. 11.) Given the disapproving tone of the court’s review of defendant’s record, and the mistaken belief that the jury’s verdict conclusively resolved the issue of whether defendant committed a nonviolent drug possession offense, the proper remedy is to remand to the trial court to determine whether defendant possessed cocaine for personal use or for the purpose of sale.

DISPOSITION

The judgment of conviction is affirmed. The cause is remanded to the trial court for its determination of the purpose for which defendant possessed the cocaine. If the trial court concludes the cocaine was possessed for personal use, it shall place defendant on Proposition 36 probation. If the trial court finds by a preponderance of the evidence that the cocaine was possessed for purpose of sale, the previously imposed state prison sentence shall stand.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.